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In the Supreme Court of the United States

OCTOBER TERM, 1926

LUTHER WEIGEL, COMMISSIONER OF IMMIGRATION AT THE PORT OF SEATTLE, WASHINGTON, PETITIONER

v.

CHIN BOW

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 237

LUTHER WEEDIN, COMMISSIONER OF IMMIGRATION at the Port of Seattle, Washington, petitioner

v.

CHIN BOW

BRIEF FOR THE PETITIONER

OPINION BELOW

The District Court filed no opinion. The opinion of the Circuit Court of Appeals (R. 31) is reported in 7 F. (2d) 369.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 3, 1925. (R. 32.)

Petition for certiorari was filed October 29, 1925, and granted December 7, 1925, under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936.

QUESTION PRESENTED

The sole question presented is whether a child born abroad of a foreign-born father of Chinese descent, who is a citizen of the United States and who resides therein, but who had never resided in the United States at the time such child was born, is entitled to admission to the United States as a citizen under the provisions of Section 1993 of the Revised Statutes of the United States.

THE STATUTE

Section 1993 of the Revised Statutes provides:

> All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

STATEMENT

On July 9, 1924, the respondent, about ten years old and born in China, upon arrival from China at Seattle applied for admission to the United States as the son of a citizen of the United States. (R. 2.) He claimed to be the son of Chin Dun. The father, Chin Dun, was born in China, being the son of Chin Tong. Chin Tong, the respondent's grandfather, was born in the United States and is therefore an American citizen. Chin Dun,

respondent's father, though born in China, is also an American citizen under the provisions of Section 1993 of the Revised Statutes. Chin Dun, respondent's father, born in China, first came to this country on July 18, 1922. The respondent, Chin Bow, was born March 29, 1914. (Original Immigration Record, pp. 34, 49, made part of the record, R. 22, and now on file with the clerk of this Court.)

After a hearing before the Board of Special Inquiry at Seattle, respondent was denied admission to the United States on the grounds—

(1) That the claim of relationship had not been established;

(2) That he was not a citizen because, at the time of his birth abroad, his father had never resided in the United States; and

(3) That he was an alien ineligible to citizenship and therefore inadmissible under Section 13 (c) of the Immigration Act of 1924. (Original Immigration Record, p. 32.)

On appeal to the Secretary of Labor the decision of the Board of Inquiry was affirmed, with the exception that the claim of relationship was admitted. Thereupon deportation of the respondent was ordered. (R. 8.)

A petition for writ of habeas corpus was then presented to the District Court for the Western District of Washington, alleging that the evidence taken before the Board of Special Inquiry showed that the respondent was a citizen of the United

States. (R. 3.) After hearing on an order to show cause why the writ should not issue, the writ was granted (R. 9) and an order discharging the respondent was entered. (R. 14.)

On appeal the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court on the ground that the respondent, under the provisions of Section 1993 of the Revised Statutes, was a citizen of the United States. (R. 31.)

In addition to Section 1993, R. S., above quoted, the following statutes and regulations have a bearing on the case:

Section 6 of the Act of March 2, 1907 (c. 2534, 34 Stat. 1228, 1229), provides:

> That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority.

Section 4 of the Immigration Act of 1924 (c. 190, 43 Stat. 153, 155) provides:

> When used in this Act the term "non-quota immigrant" means—
>
> (*a*) An immigrant who is the unmarried child under 18 years of age, or the wife, of a citizen of the United States who resides therein at the time of the filing of a petition under section 9 * * *.

Section 13 of the Immigration Act of 1924 provides (p. 162):

> (*c*) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (*b*), (*d*), or (*e*) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (*d*), and is accompanying or following to join him, or (3) is not an immigrant as defined in section 3.

Section 9 (f), Chinese Rules, promulgated by the Commissioner General of Immigration with the approval of the Secretary of Labor, and which was in force at the time of the hearing accorded the respondent, provides as follows:

> The lawful wife of an American citizen of the Chinese race may be admitted for the purpose of joining her husband, and the lawful children of such a citizen partake of his citizenship and are therefore entitled to admission. In every such case convincing evidence of citizenship and relationship shall be exacted.

SPECIFICATION OF ERRORS TO BE URGED

1. The court erred in holding that children born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, but whose fathers had never resided in the United States at the time of their birth, are citizens of the United States within the meaning of Section 1993 of the Revised Statutes of the United States.

2. The court erred in holding that the respondent was admissible to the United States as a citizen thereof under the provisions of Section 1993 of the Revised Statutes of the United States.

SUMMARY OF ARGUMENT

I. The purpose of Congress in enacting Section 1993 was to prevent, by the limitation contained in the proviso thereof, the residence abroad of successive generations of persons claiming the privileges of American citizenship while evading its duties. Unless the residence of the father occurs prior to the birth of the children, this purpose may be defeated. The wording of the Act indicates that the rights of citizenship "descend," if at all, at the birth of the children.

II. A subsequent statute in *pari materia*, viz, the Act of March 2, 1907 (c. 2534, 34 Stat. 1228, 1229), relative to children born abroad who are citizens registering at American consulates and taking the oath of allegiance, indicates by its provisions a legislative declaration or recognition that the resi-

dence of the father prescribed must precede the birth of the children.

ARGUMENT

I

THE PURPOSE OF CONGRESS AND THE WORDING OF THE ACT SUPPORT THE CONSTRUCTION THAT THE RESIDENCE PRESCRIBED MUST OCCUR PRIOR TO THE BIRTH OF THE FOREIGN-BORN CHILDREN

At the common law all persons (with certain exceptions not material here) born within the allegiance and jurisdiction of the King were natural-born subjects. The acquisition of nationality by descent is foreign to the principles of the common law and is based wholly upon statutory enactments. *United States* v. *Wong Kim Ark*, 169 U. S. 649. In England the statute of 25 Edward III, Stat. II (1350), conferred the rights of ligeance upon foreign-born children of natural-born subjects; and by the statute of 13 George III, c. 21 (1773), such rights were extended to foreign-born grandchildren of natural-born subjects. The ancient rule of citizenship by birth within the dominion, and not by descent, prevails in the United States. *United States* v. *Wong Kim Ark, supra;* Section 1992, Revised Statutes; 14th Amendment, Constitution of the United States.

Under the constitutional power "to establish an uniform rule of naturalization" Congress, by successive Acts, has made provision for the admission to citizenship of certain classes of persons, among

them being foreign-born children of American citizens, coming within the definitions prescribed by Congress.

The Act of March 26, 1790, c. 3 (1 Stat. 103, 104), provided as follows:

> * * * the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural-born citizens: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States * * *.

Subsequently other Acts were passed in substantially the same words as follows:

> The Act of January 29, 1795, c. 20 (1 Stat. 414, 415); Act of April 14, 1802, c. 28, Section 4 (2 Stat. 153, 155); Act of February 10, 1855, c. 71 (10 Stat. 604).

The Act of 1855 took the following form as Section 1993 of the Revised Statutes of the United States:

> All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

Van Dyne in "Citizenship of the United States," p. 34, in discussing Section 1993 and prior statutes, declares:

> If the father was born abroad, and has always resided abroad, his child is not a citizen, for the statute expressly declares that "the rights of citizenship shall not descend to children whose fathers never resided in the United States." This limitation of the privileges of citizenship to the children of citizens who have resided in the United States was designed to prevent the residence abroad of successive generations of persons claiming the privileges of American citizenship while evading its duties.

Borchard in "Diplomatic Protection of Citizens Born Abroad," p. 609, agrees with Van Dyne's statement of the purpose of Section 1993. Borchard continues: "It seems not to have been judicially determined whether the residence of the father in the United States must necessarily have preceded the birth of the child, but by the fact that the statute provides that citizenship shall not 'descend,' it is believed that the residence prescribed must have preceded the birth of the child, and such has been the construction of the Department [of State]."

See also:

> Hershey, Essentials of International Public Law, pp. 240–242.
>
> Hyde, International Law, Vol. I, pp. 615–617.
>
> Moore, International Law Digest, Vol. III, pp. 282–289.

Borchard's opinion that the residence prescribed in the proviso must have preceded the birth of the child would seem to be confirmed by a consideration of the entire section. A proviso should be construed with reference to the subject matter of the sentence of which it forms a part, unless it clearly appears to be designed for a broader and more independent operation. *United States* v. *Bernays*, 158 Fed. 792; Sutherland, Statutory Construction (1st ed.), Section 223. It is apparent that the proviso here restricts rather than broadens the prior subject matter, expressly limiting the class of persons to which the general enacting clause is applicable. In the first clause the rights of citizenship are granted to foreign-born children whose fathers were or may be citizens of the United States at a certain time, namely, at the time of the birth of such children. The status of the father at the time of the birth of the child determines the latter's rights; acquisition of citizenship by the father after the birth of the child is not sufficient to invest the child with the rights of citizenship. By the proviso the status of the father at the time of the birth of the child is further limited or qualified—the father not only must be a citizen of the United States, but also must have resided therein. The statute may be read as if it said:

> All children heretofore born or hereafter born out of the limits and jurisdiction of the United States whose fathers, having resided in the United States, were or may be

> at the time of their birth citizens thereof, **are declared to be citizens of the United States.**

If the residence prescribed in the proviso may occur after the birth of the children, the door is opened to the very evils Congress intended to prevent. The father may come to the United States for the first time after his children have reached maturity, and thus enable the children at some later date to enter this country as citizens thereof. Such children, once their right of admission is perfected by the residence of the father, may delay their entry until middle age; yet they would be entitled to admission, even though ignorant of American language, customs, and institutions. They must be admitted as citizens, although they have evaded the duties and responsibilities of citizenship. They may be persons likely to become public charges or afflicted with disease, yet their right to enter is secure. The process may be repeated generation after generation.

If the residence prescribed must occur prior to the birth of the children, the evils aimed at will be remedied. When a statutory provision admits of more than one construction, that one will be adopted which best serves to carry out the purposes of the Act. *Bernier* v. *Bernier*, 147 U. S. 242.

The Department of State has taken the position that foreign-born children of American fathers who have never resided in the United States prior

to the birth of such children are not citizens of the United States under the provisions of Section 1993 of the Revised Statutes. Special Instruction, Consular, No. 340, July 27, 1914, including opinion of Solicitor. (See Compilation Dept. Circulars relating to Citizenship, etc., p. 43, Government Printing Office, 1915.)

In determining the admissibility of Chinese persons in the situation of the respondent, the Department of Labor, until shortly prior to the hearing in the instant case, seems never to have considered the precise point as to the residence required of the parent. Undoubtedly such cases have arisen in the past. Rule 9 (f) of the Chinese Rules provides:

> The lawful wife of an American citizen of the Chinese race may be admitted for the purpose of joining her husband, and the lawful children of such a citizen partake of his citizenship and are therefore entitled to admission.

It is not clear and the petitioner has been unable to obtain accurate information as to whether the Department of Labor admitted children of citizen Chinese fathers who had never resided in the United States prior to their birth as citizens under the above rule, or merely admitted them as minor children of American citizens of the Chinese race under the view that, apart from any specific statutory authority, such children should be equally admissible with minor children of Chinese mer-

chants. (*United States* v. *Mrs. Gue Lim*, 176 U. S. 459.)

To sustain the view that such children were admitted as United States citizens, the respondent refers to the Annual Report of the Commissioner General of Immigration for 1924. On page 156 thereof in a summary by classes of Chinese seeking admission to the United States from 1919 to 1924, inclusive, there are listed, among other classes, "United States citizens," "Wives of United States citizens." There is no separate classification of "Children of United States citizens." There is a classification of "Miscellaneous." It is submitted that such children seeking admission may be classified either under "United States citizens" or "Miscellaneous." The original records are kept at the various ports.

The Department of Labor does not appear, until recently, to have taken any definite stand on the point.

In *Johnson* v. *Sullivan*, 8 F. (2d) 988, the Circuit Court of Appeals for the First Circuit, citing the opinion of the Circuit Court of Appeals in the instant case, held that the foreign-born son of a citizen of the Chinese race, who before the son's birth had never resided in the United States, was entitled to enter this country as a citizen under Section 1993, where the father subsequently took up residence in the United States.

The first clause of Section 1993 confers citizenship on foreign-born children at the time of their

birth if their fathers occupy a certain status at that time, viz, "are citizens thereof." It may be said that the rights of citizenship are acquired by such children "by descent." Yet such rights do not "descend" in the technical legal sense at the death of the ancestor, but on the birth of the child. In like manner, the rights of citizenship mentioned in the second clause or proviso "descend," if at all, at the birth of the children. So construed, the purpose of Congress is effected and the word "descend" interpreted in the light of the entire section.

II

SUBSEQUENT STATUTES IN PARI MATERIA INDICATE A LEGISLATIVE DECLARATION BY CONGRESS THAT THE RESIDENCE PRESCRIBED MUST OCCUR PRIOR TO THE BIRTH OF THE FOREIGN-BORN CHILDREN.

Where it can be gathered from a subsequent statute *in pari materia* what meaning the legislature attached to a former statute this will amount to a legislative declaration of its meaning and will govern the construction of the first statute. *United States* v. *Freeman*, 3 How. 556; *Cope* v. *Cope*, 137 U. S. 682. That Congress has construed Section 1993 as requiring the residence prescribed to have preceded the birth of the child is clearly indicated by the Act of March 2, 1907, ch. 2534, Section 6 (34 Stat. 1229), set forth at page 4, *supra*.

It should be noted that such Act provides that "all children born outside the limits of the United

States who are citizens thereof in accordance with the provisions of section 1993 of the Revised Statutes of the United States" shall, to receive protection of the Government, be required upon reaching the age of 18 years to register at an American consulate, and shall be further required to take the oath of allegiance upon attaining their majority. The use of the words "all children born * * * who are citizens" is significant. If Congress construed Section 1993 to permit the residence prescribed to occur after the birth of such children, it is reasonable to suppose that it would have employed appropriate words to express such meaning, e. g., "all children born * * * who are or may become citizens." But the present tense is used, indicating that citizenship is determined at the time of birth.

But even more significant are the affirmative acts required of such foreign-born children who are citizens. They are required, upon reaching the *age of 18 years*, to record their intention to become residents and *remain citizens* of the United States and take the oath of allegiance to the United States upon attaining their *majority*. If the residence prescribed for the parent may occur after the birth of the children, the father may not have resided in the United States until long after such children attain their majority. Clearly, they could not register or take the oath of allegiance, since "the rights of citizenship shall not descend to children

whose fathers never resided in the United States." Therefore, a class of foreign-born children of American citizens could not possibly comply with the provisions of the Act of 1907, which provides for "*all* children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section 1993 of the Revised Statutes of the United States." Nor could such children "remain citizens," since they are expressly denied the rights of citizenship. It is apparent that Congress construed Section 1993 as requiring the residence prescribed to precede the birth of the children.

CONCLUSION

In view of the purpose of the Act, the wording of the general enacting clause, the construction of the State Department over a long period of years, and the apparent legislative declaration by Congress in a subsequent statute in *pari materia*, it is submitted that Section 1993 requires the residence of the father prescribed in the proviso to precede the birth of the children.

Respectfully submitted.

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FEBRUARY, 1927.

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